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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 708

JOE T. PATTERSON, ET AL. *Petitioners*,

vs.

SAMUEL BAILEY, ET AL. *Respondents*.

PETITION OF CITY OF JACKSON; ALLEN THOMPSON, DOUGLAS L. LUCKEY AND THOMAS B. MARSHALL, COMMISSIONERS OF THE CITY OF JACKSON, AND W. D. RAYFIELD, CHIEF OF POLICE OF THE CITY OF JACKSON, AND JACKSON MUNICIPAL AIRPORT AUTHORITY, A PUBLIC BODY CORPORATE, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioners, some of the Appellees in the Court below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 24th, 1963, followed by the Order of said Court denying a Petition for Rehearing entered on November 8th, 1963.

Jurisdiction and Opinions Below

The basis for the jurisdiction of the courts below was 28 *U.S.C. 1343(3), 28 U.S.C. 2281* and *28 U.S.C. 2284*, the Complaint further alleging that the action was authorized

by 42 U.S.C. 1983, the action being one for alleged deprivation of rights under the Fourteenth Amendment to the Constitution of the United States. A Three-Judge Court was organized under 28 U.S.C. 2284.

An Order of the Three-Judge Court retaining jurisdiction but staying further proceedings awaiting State Court actions or decisions was entered November 17th, 1961 (R. 705). A copy thereof is submitted as Appendix "A".[1] A copy of the Opinion of the Three-Judge Court (R. 630), reported 199 F. Supp. 595, is submitted as Appendix "B". A copy of the Dissenting Opinion (R. 667) is submitted as Appendix "C".

An appeal was taken to this Court pursuant to 28 U.S.C. 1253 (R. 706). Pending the appeal a Motion was filed in this Court for an injunction to stay the prosecution of criminal cases in the Courts of Mississippi. The Motion for injunctive relief pendente lite was denied by this Court on December 18th, 1961, the Opinion being reported in 368 U.S. 346, 7 L.ed.2d 332. A copy thereof is submitted as Appendix "D".

On the appeal to this Court the Judgment of the Three-Judge Court was vacated, this Court holding that the Three-Judge Court was unnecessary, and the cause was remanded to the District Court by decision of February 26th, 1962, reported 369 U.S. 31, 7 L.ed.2d 512. Copy thereof is submitted as Appendix "E".

The District Court of the United States for the Southern District of Mississippi, Jackson Division, entered a Findings of Fact, Conclusions of Law, and Declaratory Judgment on May 3rd, 1962 (R. 732). The Opinion and Declaratory Judgment is not published and a copy thereof is submitted as Appendix "F".

[1] Appendices, because voluminous, are separately printed and presented herewith under Rule 23(1).

An oral amendment to the Findings of Fact was made by the District Judge on May 31st, 1962 (R. 843-5), not published, and a copy thereof is submitted as Appendix "G".

On July 25th, 1962, the District Court entered Supplemental Findings of Fact, Conclusions of Law and Declaratory Judgment (R. 785), not published. A copy thereof is submitted as Appendix "H".

On August 24th, 1962, there was entered in the District Court below an Order sustaining in part and overruling in part Plaintiff's Motion that the Court amend its Supplemental Findings of Fact, Conclusions of Law and Declaratory Judgment (R. 846). It has not been published and a copy thereof is submitted as Appendix "J". The Opinion of the Court which formed the basis thereof, also dated August 24th, 1962, is in letter form (R. 850) and unpublished. A copy thereof is submitted as Appendix "I".

The Decision of the District Court for the Southern District of Mississippi, Jackson Division, was reversed by the Fifth Circuit Court of Appeals on September 24th, 1963. The Opinion is reported in 323 F.2d 201. Copy of the Opinion is submitted as Appendix "K". Copy of the Judgment of said Court is submitted as Appendix "L".

A Petition for Rehearing was denied by the Court of Appeals of the Fifth Circuit without opinion on November 8th, 1963. Copy of the Order is submitted as Appendix "M".

The Order of the Court below staying the mandate for sixty days, dated November 15th, 1963, is submitted as Appendix "N".

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The specific questions presented are:

1. Whether the three Respondents, Samuel Bailey, Joseph Broadwater and Burnett L. Jacob, have any right to maintain a class action on behalf of other Negroes when they themselves have admittedly not been discriminated against on account of their race by Petitioners and have not been deprived by them of any rights under the Fourteenth Amendment to the Constitution and where they are thus not members of the class for which relief was sought.

2. Whether under the facts of this case Respondents, although personally entitled to non-discriminatory use of transportation facilities, which they obtained by Declaratory Judgment in the District Court, were entitled to injunctive relief either personally or for a class against enforcement of Segregation Statutes of the State of Mississippi or Ordinances of the City of Jackson.

3. Whether under the facts of this case Respondents, although personally entitled to non-discriminatory use of transportation facilities which they obtained by Declaratory Judgment in the District Court, were personally or for a class entitled to broad sweeping injunctive relief against any policy, practice, custom or usage of segregation of transportation facilities by Petitioners allegedly under color of the "Breach of the Peace" statutes of the State of Mississippi.

4. Whether Respondents were entitled in this Civil Rights action to any injunctive relief against the City of Jackson or the Jackson Municipal Airport Authority, a public body corporate.

The serious underlying questions involved include: (1) Whether or not our established jurisprudence applicable

to injunctive relief and class suits is now totally inapplicable in civil rights cases; (2) Whether a city by injunction against all of its law enforcement officers can be forbidden to prevent disorderly conduct and breaches of the peace where a Negro is involved on penalty of its right to so do in individual instances being triable in a Federal Court in Contempt of Court proceedings with the risk of criminal punishment for a possible error of judgment on the part of the police officers. The necessity for local police control during racial demonstrations has been amply demonstrated; and (3) Whether an individual Negro has a personal right under the Fourteenth Amendment not only to the use of any public facility he desires but whether he also has a constitutional right to the use of completely integrated facilities.

Statement

Three individual Negroes, Respondents here, filed a Complaint in the United States District Court for the Southern District of Mississippi, Jackson Division, on behalf of all other Negroes similarly situated, against the Attorney General of the State of Mississippi; the City of Jackson and the Mayor and Commissioners thereof and the Chief of Police thereof; the Jackson Municipal Airport Authority; the Continental Southern Lines; Southern Greyhound Lines; Illinois Central Railroad; Jackson City Lines; and Cicero Carr, operator of a restaurant at the Jackson Municipal Airport.

Respondents alleged that Negroes had been deprived of rights under the Fourteenth Amendment to the Constitution of the United States by the Defendants below and sought both preliminary and permanent injunctions against said Defendants enjoining them from:

"A" Enforcing certain Segregation Statutes of the State of Mississippi; i.e. Sections 2351; 2351.5, 2351.7, 7784; 7785,

7786, 7786-01, copies of which are separately submitted as Appendix "O", together with a 1956 Ordinance of the City of Jackson, copy of which is submitted as Appendix "P". It was alleged that said Statutes require segregation of facilities of carriers and that they violated the Fourteenth Amendment to the Constitution.

(B) Enforcing any policy, practice, and custom and usage of segregating passengers of any facility of a public carrier and any policy, custom or usage of harrassing or intimidating Negroes in the exercise of their Federally protected right to use interstate and intrastate transportation facilities and services without discrimination or segregation, the Complaint alleging that Defendants in so doing were acting under color of the "Breach of the Peace" Statutes of Mississippi, i.e. Section 2087.6, 2087.7 and 2089.5, copies of which are submitted as Appendix "Q" herewith.

(C) Posting or permitted to be posted signs designating separate facilities in or on any terminal or sidewalk surrounding the same.

The Court of Appeals of the Fifth Circuit acting through Circuit Judges Wisdom and Hayes, Circuit Judge Cameron dissenting, granted injunctive relief "as prayed for" against all the carriers. None of the carriers have joined in this Petition for Writ of Certiorari. The injunctive relief "*as prayed for*" was granted against those Petitioners insofar as persons using any facilities of the Jackson Municipal Airport Authority or the buses of the bus company Defendants were concerned.* 323 F.2d 201; Appendix "K" submitted herewith.

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*Question of injunctive relief against the City and its officials for enforcing or encouraging racial segregation in the use of terminal facilities of the carriers, except the Jackson City Bus Line and the Municipal Airport Authority, having, the court stated, been eliminated by the decision in *United States v. City of Jackson*, C.A. 5, 318 F.2d 1, brought by the

None of the carriers being Petitioners here, a large portion of the evidence in the record is eliminated. There is here involved none of the alleged acts of any of the carriers, including the Jackson City Lines, in maintaining any racial signs or enforcing or encouraging any racial segregation in their terminals or facilities. Also any testimony as to any incidents occurring outside of the City of Jackson are eliminated, i.e. any incidents not involving officials of the City of Jackson or the Municipal Airport Authority.

That there was no ground for any class action was frankly and freely admitted by Respondents themselves. Each of these three claimants testified that they had never been arrested under any of the statutes or under the ordinance complained of, nor had they been threatened with or in danger of any arrest under such statutes or ordinance. They went further and testified that they themselves had never been deprived of or denied the indiscriminate use of any facility of any Defendant. They also admitted that they had not consulted with any other members of the class they purported to represent before the action was brought and that they knew that all members of the alleged class did not approve of their action or did not agree with the position being taken by them in the action. (Broadwater, R. 109-11; Jacob, R. 120-22; Bailey, R. 140-42)

Not only did Respondents, Plaintiffs below, admit that they themselves had never been arrested under any of the "Segregation Statutes", but no other witness testified that he had ever been arrested under any of these statutes or the City Ordinance complained of or been threatened with any arrest thereunder and the undisputed testimony of the City officials was that they had never arrested or threatened

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United States of America under the Interstate Commerce Commission Act. Also eliminated was the question of racial signs maintained by the City of Jackson surrounding terminals, which had been removed as a result of said decision.

arrest of anyone under these statutes (R. 348, 354-6, 359). The unconstitutionality of these statutes was thoroughly recognized by city officials and there was no suggestion of any intent on the part of the City to attempt to enforce such unconstitutional statutes. The Mayor testified that the City had no objection to Negroes using any facility of any carrier where peace and quiet could be maintained and there would be no disturbances (R. 355).

The issue of the existence of the City signs on side walks surrounding terminals being removed and eliminated, the only evidence against the City or its officials dealt with arrests of Freedom Riders under the "Breach of the Peace" statutes. Unquestionably, there were a substantial number of arrests of these Freedom Riders occurring after April, 1961, when the Freedom Riders made their much publicized invasion of Mississippi, all such arrests being made under the Breach of the Peace Statutes. The disorders and breaches of the peace and disturbances caused by these same Freedom Riders in Alabama and the fact that they were coming into Mississippi to create the same disturbances had become public knowledge in the State of Mississippi (R. 492-507, 507-513, 516-519). One objection was made to the evidence of these arrests in this cause on the ground that it was a collateral attack on criminal actions pending in the State court (R. 474, et seq). These cases are still pending in the State Courts and several of them have now been submitted to the Supreme Court of the State of Mississippi and a decision may be reached therein at any time.[2]

In each instance of such arrest for breaches of the peace sufficient crowds had congregated under such circumstances as to indicate to local officials probable breaches of the

[2] If such a decision is handed down prior to a decision in this Petition, copies of the opinions will be submitted as a supplement hereto.

peace. The police officers in their opinion were convinced in each instance that there would have been trouble and there would have been a breach of the peace had the police not taken action. Such action prevented any serious disturbances in Mississippi. In each instance the police, before any arrest, ordered the crowds or groups dispersed. In each instance only those who refused to obey the order of the police to disperse or move on were arrested. In each instance in arrests of the Freedom Riders both white and colored were arrested at the same time, i.e. all were arrested who refused to move on at the order of the officers at a time when and under circumstances such that a breach of the peace could be occasioned by the failure of the crowd to obey the orders of the police (R. 370-6, 378-9, 381-2, 386-8, 444-49, 454-56, 459-46, 185-6, 261-71).

However, we again point out that none of the Respondents were among the groups so arrested under the "Breach of the Peace" statutes or even in the crowd at the time or observed any such arrest.

As to the Municipal Airport Authority, a separate statutory authority created by Sections 7545-32, et seq. of the Code pertinent portions of which are submitted as Appendix "B" hereto. The proof showed that there had been racially discriminatory signs in the airport terminal. However, prior to the final decree of the Court below and on June 4th, 1962, these signs had all been removed from the airport (R. 770). None of the Segregation Statutes were applicable to the airport. The Airport Authority had no jurisdiction over the enforcement of law or arrests in the airport, a City policeman being assigned to the airport and the policeman not taking orders from the Authority. There was no evidence of any arrests in the airport and none had been reported to the Authority. The Authority had no policy of discrimination. True, the airport restau-

rant, operated by Cicero Carr, had been segregated by this lessee of the Airport Authority over whom the Airport Authority had no control. However, when Carr refused to conform to the Decree of the District Court to discontinue such discrimination and before the final order in the District Court, the Authority terminated Carr's lease and filed an affidavit to the effect that in the future the Authority itself would operate the restaurant and would operate it without discrimination (R. 810-11).

Again Respondents admittedly had been subjected to no such discrimination themselves and had not been deprived of any use of any airport facility.

The District Court made a finding of Fact and Law that this was not a proper class action and that no relief could be granted other than that to which the Respondents were personally entitled. The Court and adjudged that each of the three plaintiffs had a right to unsegregated use of any transportation facility and were given relief by way of declaratory judgment. The Court held however the Plaintiffs were not entitled to any injunctive relief but jurisdiction was retained for the entry of further orders and relief as might be subsequently appropriate (R. 740, Appendices F, G, H, I and J).

Reasons for Allowance of Writ

1. *The ruling of the United States Court of Appeals for the Fifth Circuit that this was a proper class action and that Respondents were entitled to class relief is in direct conflict with decisions of this Court and in direct conflict with prior decisions of the Circuit Court of Appeals of the Fifth Circuit and in direct conflict with prior decisions of other Courts of Appeal in other Circuits.*

The decision of the Court of Appeals for the Fifth Circuit in this case is in direct conflict with the decision

of this Court in *McCabe v. Atchison*, 59 L.ed. 169, 235 U.S. 151. There an action was brought by a few Negroes for a class injunction against railroad carriers to prevent them from complying in any way with a State separate coach law. There the Complainants had never requested the Defendants for accommodations in any sleeping cars, dining cars or chair cars and Complainants had never been notified by the Defendants that they would not be furnished to them, when furnished to others, upon reasonable request and payment of the customary charge. Complainants had thus never been refused accommodations equal to those afforded to those of the white race. The injunction was sought to be justified on the ground of avoiding a multiplicity of suits, the Complaint alleging "... there being at least 'fifty thousand persons of the Negro race in the State of Oklahoma' who will be injured and deprived of their civil rights". The lower Court dismissed the Bill and this Court, in affirming the lower Court's decree, stated:

> "... The Complainant cannot succeed because someone else may be hurt. *Nor does it make any difference that other persons who may be injured are persons of the same race* or occupation. It is the fact, clearly established, of injury to the Complainant—not to others, which justifies judicial intervention. ... The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction, and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed."

The decision of the Court below is in direct conflict with *Dawley v. City of Norfolk*, 159 F.Supp. 642, affirmed 260 F.2d 647, C.A. 4, Certiorari denied, 3 L.ed.2d 636, 359 U.S. 935. There an action was brought by a Negro attorney for a mandatory injunction requiring the City to remove the word "colored" from doors of certain restrooms in a courthouse building occupied by State Courts and Judges. The Court held that this relief could not be secured by plaintiff. The District Court Judge pointed out: "There had been no threats or orders to plaintiff with respect to using the rest rooms in the state courthouse building."

The decision of the Circuit Court of Appeals for the Fifth Circuit is in direct conflict with decisions of other Federal Courts of other Circuits holding that a party cannot obtain injunctive relief on behalf of a class where he is not a member of the class in that he has not been personally discriminated against or deprived of rights sought to be obtained for others or actually suffered any wrongs sought to be remedied in the litigation on behalf of the class. These Decisions include: *Kansas City v. Williams*, C.A. 8, 205 F.2d 47; *Hickey v. Illinois Central Railroad*, C.A. 7, 278, F.2d 529; *Rock Drilling, Blasting, etc. v. Mason & Hanger Co.*, C.A. 2, 214 F.2d 687; *Carroll v. Associated Musicians of Greater New York*, C.A. 2, 316 F.2d 574; *Brown v. Ramsey*, C.A. 8, 185 F.2d 225. See also: *Johnson v. Crawfis*, 128 F.Supp. 230; *Anderson v. Kelly*, 32 F.R.D. 355; *Conley v. Gibson*, 29 F.R.D. 519.

The decision of the Court of Appeals for the Fifth Circuit in this case is, we submit, in direct conflict with prior decision of this Court in this case, i.e *Bailey v. Patterson*, 368 U.S. 347, 7 L.ed.2d 332, and *Bailey v. Patterson*, 369 U.S. 31, 7 L.ed.2d 512. In the first opinion on a Motion for an injunction *pendente lite* to stay the prosecution of a number of criminal cases in Mississippi Courts, the Court

denied relief on the primary ground that there was no justification for the extraordinary remedy and two concurring justices, Mr. Justice Black and Mr. Justice Frankfurter, also pointed out that: "The three movants are not themselves being prosecuted or threatened with prosecution in Mississippi . . ."

In the second decision, in overruling the Order of the Three-Judge Court that the case be delayed pending a State construction of the statutes involved, 369 U.S. 31, 7 L.ed.2d 512, this Court held that the Respondents lacked standing to enjoin prosecutions under the Mississippi Breach of the Peace Statutes in that "They cannot represent a class of whom they are not a part".

After the remand of this case after these decisions no additional evidence was offered with reference to any discrimination against the Respondents or any matters or things making them a member of the class for whom they sought relief. This case stands before this Court on this issue on exactly the same facts that existed at the time of the prior decisions.

The Court of Appeals for the Fifth Circuit apparently misconstrues one sentence in the decision of this Court in 369 U.S. 31, 7 L.ed.2d 512. This Court merely stated: "But as passengers using the segregated transportation facilities they are aggrieved parties and have standing to enforce *their rights* to nonsegregated treatment. *Mitchell* v. *United States*, 313 U.S. 80, 93, 85 L.ed. 1201, 1210, 61 S Ct 873; *Evers* v. *Dwyer*, 358 U.S. 202, 3 L.ed.2d 222, 79 S Ct 178." This Court was clearly only referring to Respondents having a standing to enforce their personal rights, not class rights. True, *Mitchell* v. *U.S.*, supra, and *Evers* v. *Dwyer*, supra, were class suits. But in each of those cases the passenger seeking rights was actually a member of the class. For example, in *Mitchell* v. *U.S.*, supra, the

action was brought by a Negro who was himself put off of the pullman into a coach on crossing a state line by an employee of the carrier. The employee in so doing was admittedly engaged in enforcing a State statute. Or, for example, in *Evers* v. *Dwyer*, supra, the Plaintiff himself was ordered to move to the rear of a Memphis bus because of his color and upon his refusal two police officers entered the bus and ordered him to go to the back of the bus or get off and on this order he left the bus.

This Court therefore clearly used these cases as an illustration of the personal rights of Respondents because they were public transportation facility cases and in so using them this Court at the same time clearly stated that Respondents "cannot represent a class of whom they are not a part. *McCabe* v. *Atchison, T & S. F. R. Co.*, 235 U.S. 151, 162, 163, 59 L.ed. 169. . ." This Court did no more than remand the case for disposition by the District Court "of the *appellants'* claims of right to unsegregated transportation service" i.e. referring to their personal rights. It did not hold that they were entitled to class relief.

Note the difference between the order in the prior appeal of this case, supra, and in the order of this Court in the case of *Turner* v. *Memphis*, 7 L.ed.2d 762, 369 U.S. 350. There the plaintiff was "a Negro who was refused nonsegregated service in the Memphis Municipal Airport restaurant" and who brought the action for himself and other Negroes similarly situated. There the plaintiff was a member of the class and the order of this Court read: ". . . The case is remanded to the district court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained." Here there was no order of this Court remanding the case for class relief or for injunctive relief but merely for appropriate personal relief

after the Court had pointed out that Respondents were not entitled to class relief.

The Court of Appeals for the Fifth Circuit frankly admits that the decision in this case is in conflict with prior decisions of that Court, pointing out that it was in conflict with *Clark* v. *Thompson*, 206 F.Supp. 535, affirmed 313 F.2d 637. Petition for Certiorari denied December 16, 1963. The Court of Appeals for the Fifth Circuit adopting the opinion of the District Court which used the following language:

> "None of the plaintiffs has been arrested or threatened with arrest under any statute or alleged discriminatory practice attacked in this case. The plaintiffs have not been denied any right, privilege or immunity claimed by them by any of the defendants. . . . There is no evidence that they have been denied the right to use any public recreational facility in that city . . . This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled . . . The plaintiffs cannot make this a legitimate class action by merely calling it such . . . Class action cannot be maintained where the interests of the plaintiffs . . . are not wholly compatible with the interests of those whom they purport to represent."[*]

The decision here is also in conflict with another decision of the Court of Appeals of the Fifth Circuit, i.e. *Brown* v. *Board of Trustees*, 187, F.2d 20, where the Court cited with approval *McCabe* v. *Atchison*, supra, and pointed out ". . . it is elementary that he has no standing to sue for the deprivation of the civil rights of others." The Court there also pointed out: "A suit to supervise and control by in-

[*] Even in a class suit claimant's interest must be wholly compatible with that of the class. *Troup* v. *McCart*, C.A. 5, 284 F.2d 289.

junction the general conduct of a political subdivision of the state, this suit has for its purpose, not the mere according of a specific right which has been denied, but the establishment of a sort of general government by injunction over the school district in respect of its schools and school system . . . Such an injunction . . . will not usually be granted."

We submit that the Court of Appeals of the Fifth Circuit in the opinion here is in error in saying the decisions of that Court are divided on this question in that there is no Fifth Circuit decision authorizing a class suit under the circumstances here.

In support of that position the Court of Appeals of the Fifth Circuit refers to *Derrington* v. *Plummer*, 240 F.2d 922, certiorari denied sub nom *Casey* v. *Plummer*, 353 U.S. 924, 1 L.ed.2d 719. The facts in that case are stated in the District Court opinion in 148 F.Supp. 326 sub nom *Plummer* v. *Casey* where the Court pointed out: "Plaintiffs contend that they are and have been routinely excluded from the court house cafeteria solely by reason of their race and color specifically, plaintiffs allege that they were excluded on August 27th, 1953, when they sought to buy and consume food upon the premises." The case was clearly a proper class action.

The Court of Appeals of the Fifth Circuit then refers to *Shuttlesworth* v. *Gaylord*, 202 F.Supp. 59, affirmed sub nom *Hanes* v. *Shuttlesworth*, 310 F.2d 303, based on a prior decision of that Court in *City of Montgomery, Alabama* v. *Gilmore*, 277 F.2d 364. In both of those cases the defendant city was unquestionably enforcing under state statutes and city ordinances complete segregation of municipal facilities. The specific question of the right to maintain a class action was not raised. However, in each of those cases the plaintiffs themselves had filed a petition with the city authorities seeking as Negroes personal permission to use the facilities and had been refused such right. Here

the respondents freely admitted that they had never been denied any right to do anything they wanted to do (R. 110, 11, 122, 142).

The Court below has sought to justify its decision on the basis of desegregation of schools cases citing *Potts* v. *Flax*, C.A. 5, 313 F.2d 284, in turn citing *Bush* v. *Orleans Parish School Board*, C.A. 5, 308 F.2d 491, 503. These cases were proper class suits.

The case of *Bush* v. *Orleans Parish School Board*, C.A. 5, 308 F.2d 491, affirming 204 F. Supp. 568, is merely a final step in a long series of decisions.[5] The litigation was brought by a group of minor Negro plaintiffs and all Negroes similarly situated seeking desegregation of the schools of Orleans Parish, Louisiana. The opinion in 138 F. Supp. 33 pointed out that the plaintiffs "have petitioned the Board on three separate occasions asking that their children be assigned to nonsegregated schools." This had been refused these plaintiffs. Desegregation orders were entered. By the time of the decision in 204 F. Supp. 568, which was affirmd 308 F.2d 491, 503, a hundred and one additional intervenors were before the Court. It was a proper class action.

A Negro child can, neither individually nor of course for a class obtain relief in the desegregation of schools until they have personally exhausted their administrative remedy and been denied attendance in a white school, i.e. actually been personally deprived of their rights. *Parham* v. *Dore*, C.A. 8, 271 F.2d 132; *Carson* v. *Warlick*, C.A. 4,

[5] For the prior history of the litigation, see *Bush* v. *Orleans Parish School Board*, E.D.La., 138 F.Supp. 337, affirmed, 5 Cir., 242 F.2d 156; id., 163 F.Supp. 701, affirmed, 5 Cir., 268 F.2d 78; id., 187 F.Supp. 42, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 188 F.Supp. 916, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 190 F.Supp. 861, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 191 F.Supp. 871, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 194 F.Supp. 182, affirmed, *Bonny* v. *Bush*, 365 U.S. [illegible], 81 S.Ct. [illegible], 5 L.Ed.2d 1296; id., 194 F.Supp. 182, affirmed, *Gremillion* v. [illegible], 366 U.S. 568, 81 S.Ct. 1333, 6 L.Ed.2d 1179.

238 F.2d 724, cert. den. 353 U.S. 910, 1 L.Ed. 2d 664; *Covington* v. *Edwards*, C.A. 4, 264 F.2d 780, cert. den. 4 L.Ed.2d 79, 361 U.S. 840; *Holt* v. *Raleigh City Board*, C.A. 4, 265 F.2d 95, cert. den. 4 L.Ed.2d 63, 361 U.S. 818; *McKissick* v. *Durham City Board*, 176 F. Supp. 3. See *Johnson* v. *Stevenson*, C.A. 5, 170 F.2d 108, cert. den. 93 L.Ed. 359, 335 U.S. 801; *Peay* v. *Cox*, C.A. 5, 190 F.2d 123; *Bates* v. *Batte*, C.A. 5, 187 F.2d 142, cert. den. 96 L. Ed. 616, 342 U.S. 815, following *Cook* v. *Davis*, C.A. 5, 178 F.2d 595.

Similarly, in *Potts* v. *Flax*, C.A. 5, 313 F.2d 284, affirming 204 F.Supp. 458, suit was brought by six Negro children of Herbert Teal and one Negro child of Flax. The Court pointed out; "... the children named in the complaint were refused enrollment at the school nearest their respective homes solely on the ground of their race and color."[6] The decree granting class relief was not challenged on the ground that plaintiffs were not members of the class. It was merely challenged on the ground that "such matters are not ... determined on a class basis since the Board 'must' register each child one at a time as individuals."[7] I.e. the contention was made that there could be no class action whatsoever in a school case. The Court merely held: "The *pleaded reason* for challenging the class suit was, therefore, unfounded."

The issue here was not presented in either of the above cases and could not be presented because the plaintiffs were members of the class and actually discriminated against. Any language therein, therefore, with reference to segregation in the schools being discrimination against "a class as a class", which is "appropriate for class relief" is

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[6] Quoting 204 F.Supp. at 460.

[7] Quoting 313 F.2d at 288.

pure dicta insofar as the right of Respondents to bring an action for a class is concerned.

In the present case the Court of Appeals has attempted to *take such language out of context* and thereby in reality *create a new constitutional right*. That Court has said that although Respondents sought class relief (and by the judgment here are in reality granted class relief) it is really not a class action in that plaintiffs "seek the right to use facilities *which have been desegregated* . . ." No other court has gone so far.

No such right is given by the Fourteenth Amendment to the Constitution. This Amendment merely forbids any state from depriving "any person" of due process of law or denying to "any person" the equal protection of the laws. The rights under the Fourteenth Amendment are individual personal rights, not class rights. *Shelley v. Kraemer*, 92 L.ed. 1161, 34 U.S. 1; *McGhee v. Sipes*, 92 L.ed. 1161, 34 U.S. 1; *Sweatt v. Painter*, 339 U.S. 629, 94 L.ed. 1114; *Gaines v. Canada*, 305 U.S. 337, 83 L.ed. 208.

The Constitution only protects against state action depriving an individual of his "life, liberty or property". A man is deprived of none of these merely because he desires in his pursuit of happiness to live in a completely integrated community. Congress cannot under the power given it by the Fourteenth Amendment regulate "all private rights between man and man in society". *Civil Rights Cases*, 109 U.S. 3, 27 L.ed. 836. The effect of such a theory is that any one Negro, although not himself deprived of any of his rights of liberty or to equal protection of the law could require or compel, even contrary to the wishes of other Negroes, complete integration. And yet the Fourteenth Amendment merely prohibits state enforced segregation against an individual and does not command integration. *Shuttlesworth v. Birmingham Board*, 162 F.Supp.

372, affirmed per curiam 3 L.ed.2d 145, 358 U.S. 101; *Holland* v. *Board of Public Instruction*, C.A. 5, 258 F.2d 730; *School Board* v. *Allen*, C.A. 4, 240 F.2d 59; *Cohen* v. *Public Housing Administration*, C.A. 5, 257 F.2d 73; *City of Montgomery* v. *Gilmore*, C.A. 5, 277 F.2d 364, where this same Court said: "We can only call attention to the limit of the pertinent constitutional provision as construed by the Supreme Court, i.e. that it does not compel the mixing of the different races in the public parks."

If the law does not compel integration, how can an individual compel complete integration? The acts of the State must adversely affect the "*legal*" interests of a petitioner, not merely the personal interests. Separate opinion of Judge Frankfurter, *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 95 L.ed. 817, 341 U.S. 123.

The Fourteenth Amendment itself grants no rights but only protects against infringement of existing rights. "Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Ownbey* v. *Morgan*, 65 L.ed. 837, 256 U.S. 94. See also *M. & O. R.R. Co.* v. *State*, 153 U.S. 486, 38 L.ed. 793 at pages 506 and 800.

A Negro has under the Fourteenth Amendment no right to general desegregation. For example, he has a constitutional right not to be deprived of the right to serve on a jury, but the Constitution gives him no right to require that there be other Negroes on the jury. By whatever name it was called the Court below was in the final analysis still saying that Respondents had a right to protect the rights of other Negroes although not deprived of their own rights.

The Constitution not requiring segregation and therefore Respondents having no constitutional right to anything but their own personal freedom from discrimination, the fact that they may be aggrieved by or made unhappy by the segregation of others does not allow such person to challenge the constitutionality thereof.

For example, the case of *Tileston* v. *Ullman*, 318 U.S. 44, 87 Led. 603, a state statute prohibited giving of advice as to the use of contraceptives. A physician was aggrieved thereby in that the statute would prevent his giving professional advice to three patients whose condition of health was such that their lives would be endangered by childbirth. The Court held that he had no standing to litigate the constitutional question, the statute obviously depriving his patients and not him of constitutional rights.

Or, for example, in *Tennessee Electric Power* v. *Tennessee Valley*, 306 U.S. 118, 83 Led. 543, an unconstitutional statutory grant of power to the Tennessee Valley Authority to erect a series of dams on the Tennessee River and sell the power created thereby resulted in competition to certain public utility corporations. The Court held that although aggrieved at the result of the unconstitutional Act the utilities could not attack the unconstitutionality thereof.

See also *Collins* v. *Texas*, 223 U.S. 288; 56 Led. 439; *Jeffrey Manufacturing Company* v. *Blagg*, 235 U.S. 571, 59 Led. 364. See concurring opinion of Mr. Justice Frankfurter in *Coltman* v. *Miller*, 307 U.S. 433, 83 Led. 1385; *Erie Railroad* v. *Williams*, 233 U.S. 68, 58 Led. 1155; *Tumey* v. *Wiscl*, 334 U.S. 385, 92 Led. 1460, 93 L.Ed. 389.

The only time that any person has been allowed to attack the constitutionality of a statute, except for the direct and explicit purpose of redressing a wrong actually done him, is in a class case. Class cases are a creature of equity and have always been in our jurisprudence subject to the provision that the plaintiff must be a member of the class. This principle has been readopted in Rule 23 of the Rules of Federal Practice. The allowance of a class suit here under the circumstances of this case would be an instance of the throwing of precedence and established legal principle out of the window. If this decision is allowed to stand, then, at least in the Fifth Circuit, any single Negro can require

the integration of an entire community although he himself has not been in any way discriminated against or denied any rights or privileges under the Constitution and even though as a matter of fact the actual members of the class which he seeks to represent may not desire or approve of the litigation.

2. *The holding of the Court of Appeals of the Fifth Circuit that Respondents for themselves and for the class were entitled to injunctive relief under the facts and circumstances here is in direct conflict with decisions of this Court and of the Courts of Appeal of other circuits and with prior decisions of the Fifth Circuit Court of Appeals.*

The imposing of an injunction against a defendant, and particularly against public officials, is an extraordinary remedy applied with great hesitancy and only under unusual circumstances because of the stigma and the harsh penalties attached thereto. The tendency of some federal courts in civil rights actions to overlook this fact and ignore applicable precedents and long established principles of equity controlling injunctive relief should be curbed by this Court. In some Circuits broad sweeping permanent injunctions are becoming the rule not the exception and we submit, it behooves this Court to require that these established precedents and principles be as applicable in Civil Rights actions as in other actions.

The facts of this case do not justify the granting of any injunctive relief either to the Respondents personally or for a class, much less the granting of the broad sweeping class injunctive relief against public officials. The granting of the injunctive relief by the Circuit Courts of Appeals of the Fifth Circuit here was in conflict with all of the following well established principles.

(a)

A Court will not enjoin the enforcement of state criminal statutes, even if unconstitutional, unless the same have been enforced against petitioner or petitioner is threatened with enforcement thereof, and he is in clear and imminent danger of immediate arrest thereunder.

These Petitioners here were enjoined from enforcing certain unconstitutional criminal statutes of the State of Mississippi, including one Municipal Ordinance. The Municipal Airport Authority had no authority to and did not enforce any statutes. It was undisputed that the officials of the City of Jackson had never enforced any of the statutes complained of nor threatened the enforcement thereof. Respondents position was that they did not need to be actually arrested before obtaining injunctive relief. While under unusual circumstances this is true, there can be no injunctive relief unless Respondents were actually threatened with enforcement of the criminal statutes and were in clear and imminent danger of arrest thereunder. Not only were these Respondents not threatened with any arrest under the statute, but no arrest of anyone had ever been made or threatened or contemplated.

Cases denying the right to injunctive relief under such circumstances include: *Poe v. Ullman*, 6 L.ed.2d 512; 367 U.S. 497; *Bailey v. Patterson*, 7 L.ed.2d 332, 368 U.S. 346; *American Federation of Labor v. Watson*, 90 L.ed. 873, 327 U.S. 582; *Spielman Motor Sales v. Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Stefanelli v. Minard*, 96 L.ed. 138, 342 U.S. 117; *Watson v. Buck*, 85 L.ed. 1416, 313 U.S. 387; *Bradford v. Hunt*, C.A. 5, 84 F.2d 7[illegible]; *Empire Pictures Distributing Company v. City of Fort Worth*, C.A. 5, 273 F.2d 529.

Equity will not grant an injunction because of the mere apprehension or suspicion or fear that there might be a

need therefor. *First National Bank* v. *Albright*, 52 L.ed. 614, 208 U.S. 548; *Walling* v. *Ruettner & Co.*, C.A. 7, 133 F.2d 306; *Redlands Foothill Groves* v. *Jacobs*, 30 F.Supp. 995.

(b)

The refusal of injunctive relief was within the discretion of the trial judge which was not abused.

The trial judge who exercised his discretion in refusing injunctive relief in the District Court was the same trial judge that denied injunctive relief against the same Petitioners, i.e. the City of Jackson and its officials, in the case of *Clark* v. *Thompson*, 206 F.Supp. 539, affirmed by the Court of Appeals, Fifth Circuit 313 F.2d 637.

The Court in denying injunctive relief there specifically held that in his opinion it was unnecessary and that the individual defendants, the City officials, were "all outstanding high-class gentlemen and in my opinion will not violate the terms of the Declaratory Judgment issued herein . . . They will conform to the ruling of this court without being coerced so to do by an injunction." This finding by the trial judge was affirmed by the Fifth Circuit Court of Appeals. It is applicable here.

Cases holding that the discretion exercised by a trial judge in denying injunctive relief is reviewable only for abuse of discretion and that under the facts here there was no abuse of discretion particularly where the injunction sought was to control state officers in the conduct of their office who are presumed to obey the law, include: *Brotherhood* v. *Missouri-Kansas-T. R. Co.*, 4 L.ed.2d 1379, 363 U.S. 528; *Peay* v. *Cox*, C.A. 5, 190 F.2d 123, cert. den. 96 L.ed. 671; *Barnes* v. *City of Gadsden*, C.A. 5, 174 F.Supp. 64, affirmed 268 F.2d 593, cert. den. 4 L.ed.2d 186; *Bowles* v. *Huff*, C.A. 9, 146 F.2d 428; *Hecht Company* v. *Bowles*, 321

U.S. 321, 88 L.ed. 754; *Reliable Transfer v. Blanchard*, C.A. 5, 145 F.2d 551; *Spielman Motor Sales v. Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Beal v. Missouri Pacific R. Corp.*, 312 U.S. 45, 85 L.ed. 577; *Sterling v. Constantin*, 287 U.S. 378, 77 L.ed. 375; *Dawley v. City of Norfolk*, C.A. 4, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.ed.2d 636; *Kansas City v. Williams*, C.A. 8, 205 F.2d 47.

The trial judge in *Clark v. Thompson*, supra, in exercising his discretion denying injunction against the officials of the City of Jackson also stated that these officials knew what the law was and what their obligations were and that they would conform to the ruling of the Court. He then stated: "I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the court without any injunction hanging over their heads". This statement leads us to:

(c)

An injunction should only issue with great caution and only in exceptional circumstances to prevent immediate irreparable injury.

In *Spielman Motor Sales v. Dodge*, 79 L.ed. 1322, 295 U.S. 89, this Court stated:

> "To justify such interference (by injunction) there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . . The bill contained general allegations of irreparable damage and deprivation of 'rights, liberties, properties and immunities' without due process of law, if the statute were enforced. But the bill failed to state facts suffi-

cient to warrant such conclusions, which alone were not enough."

See also *Dawley v. City of Norfolk*, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.ed.2d 636; *Beal v. Missouri Pacific*, 312 U.S. 45, 85 L.ed. 577; *Sterling v. Constantin*, 287 U.S. 378, 77 L.ed. 375; *Redlands v. Jacobs*, 30 F.Supp. 995; *American Federation of Labor v. Watson*, 327 U.S. 582, 90 L.ed. 873.

(d)

The Court cannot enjoin the future enforcement of constitutional breach of the peace statutes.

The injunction here ordered by the Court of Appeals was a broad sweeping injunction prohibiting Petitioners from enforcing any policy, practice, custom or custom and usage of segregating persons using transportation facilities under color of the Mississippi Breach of the Peace Statutes.

There had, as reflected by this record, been a substantial number of arrests by City officials under the Breach of the Peace statutes. In each instance both white and colored had been arrested and there had been no arrests when persons gathering in crowds did disperse upon order and no arrests save where the police officers were of the honest and firm conviction that a breach of the peace was imminent.

It is not alleged that these Breach of the Peace statutes are unconstitutional and they are not unconstitutional on their face (See Appendix "Q"). Whether or not they were accutally in any one instance enforced so as to deprive any particular person of his constitutional rights would depend upon the special facts and circumstances of the individual case now pending in the State courts. They were never enforced against Respondents or in their presence. Nor were Respondents ever a member of any of the groups

ordered to move on. Persons so arrested are having their day in court and will have an opportunity to appeal to this court if they so desire. Whether or not there will be any future arrests under this statute that might deprive any particular individual of his constitutional rights will depend upon the facts and circumstances of the arrest, *which cannot be predicted.* And yet the Court of Appeals of the Fifth Circuit has issued a blanket injunction against these Petitioners, public officials who would be presumed to do their duty and obey the law which they understand, preventing them generally from enforcing in any way the Breach of the Peace Statutes where a Negro was involved under penalty of contempt of court proceedings.

In *Douglas* v. *Jeannette*, 319 U.S. 157, 87 L.ed. 1324, certain members of Jehovah's Witnesses had been arrested for soliciting and distributing religious literature under a municipal ordinance prohibiting solicitation without procuring a license from the City authorities. It was alleged that the City officials threatened to continue to enforce the ordinance by arrests and prosecution of any members of the Jehovah Witness under this ordinance and plaintiff members, for all members of the Jehovah's Witnesses, sought an injunction to restrain the city officials from enforcing this ordinance against the members of the Jehovah's Witnesses. The Court, in affirming the dismissal of the petition, used the following language:

> . . . . Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened pro-

ceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. . . .

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Davis & F. Mfg. Co. v. Los Angeles, 189 US 207, 47 Led. 778, 23 S Ct 498; Fenner v. Boykin, 271 US 240, 70 Led. 927, 46 S. Ct. 492. . . .

". . . It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith. . . .

"Nor is it enough to justify the exercise of the equity jurisdiction in the circumstances of this case that there are numerous members of a class threatened with prosecution for violation of the ordinance. In general the jurisdiction of equity to avoid multiplicity of civil suits at law is restricted to those cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. *It does not ordinarily extend to cases where there are numerous parties and the issues between them and the adverse party here the state—are not necessarily identical.* Matthews

v. Rodgers, supra (284 US 529, 530, 76 L ed 454, 455, 52 S Ct 217), and cases cited. *Far less should a federal court of equity attempt to envisage in advance all the diverse issues which could engage the attention of state courts in prosecutions of Jehovah's Witnesses for violations of the present ordinance, or assume to draw to a federal court the determination of those issues in advance, by a decree saying in what circumstances and conditions the application of the city ordinance will be deemed to abridge freedom of speech and religion.*

* * *

"For these reasons, establishing the want of equity in the cause, we affirm the judgment of the circuit court of appeals directing that the bill be dismissed." (emphasis ours)

The language in the last paragraph quoted from the *Douglas v. Jeannette* case, supra, is particularly applicable here. Here the issues between the City and the parties arrested under the Breach of the Peace statutes are not only not necessarily identical but would be different on each occasion of a breach of the peace. A federal court of equity could not attempt to envisage in advance all the diverse issues of fact and law which could engage the attention of the state courts in prosecutions under the Breach of Peace Statutes or assume to draw to a federal court the determination of those issues in advance by a decree, in effect saying that under no circumstances could the Breach of the Peace Statutes be enforced against Negroes in or on transportation facilities.

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* Later cases expressing the reluctance of the federal courts to interfere with the enforcement of criminal statutes by state or municipal authorities and citing and relying on *Douglas v. Jeannette*, supra, include *Kingsley*

We also call the attention of the Court to the language in *United Electrical Workers v. Baldwin*, 67 F.Supp. 235, as follows:

> "It does not appear that any federal right to utilize a solid line of pickets blocking entrance to the plant exists. *Whether such an activity constitutes a breach of the peace under Connecticut law, it is not incumbent upon this court to decide . . . .*
>
> "*. . . And the right of officials of the state to prevent breaches of the peace cannot be denied.* Thornhill v. Alabama, supra, 310 U.S., at 105, 60 S. Ct. 736, 84 L. Ed. 1093. * * * In such situations we are all familiar with the fact that the police often lay down rules which temporarily interfere with one or another basic right. To deny them the power to do so would be as much a burdensome restraint on their duty to preserve the peace. . . ."
>
> (emphasis ours)

See also *Watson v. Buck*, 313 U.S. 387, 85 L.ed. 1460.

(c)

The denial of injunctive relief against the Municipal Airport Authority by the Trial Judge was peculiarly within his discretion.

The only matters and things proved against the Municipal Airport Authority were the presence of some racial signs in the airport and racial discrimination by lessee in the restaurant. Prior to the final decree in the District Court all signs had been removed and the lease of the

Pictures Distributing Co. v. City of Ft. Worth, C.A. 5, 273 F.2d 529; *Stefanelli v. Minard*, 342 U.S. 117, 96 L.Ed. 138; *Wilson v. Schnettler*, 365 U.S. 381, 5 L.ed.2d 620. See also *Bradford v. Hurt*, C.A. 5, 84 F.2d 722.

restaurant to Cicero Carr had been cancelled and an affidavit had been filed by the Municipal Airport Authority to the effect that it would operate the restaurant itself without segregation.

The Court of Appeals of the Fifth Circuit reversed the refusal of the District Judge to enjoin the Municipal Airport Authority in the face of *U.S. v. Grant*, 346 U.S. 629, 97 L.ed. 1303, where this Court in denying injunctive relief after voluntary cessation of alleged illegal conduct by the defendant stated:

> "But the moving party must satisfy the Court that relief is needed. The necessary determination is that there exist some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The Chancellor's decision is based on all the circumstances; his discretion is necessarily broad and his strong showing of abuse must be made to reverse it . . . The government must demonstrate that there was no reasonable basis for the District Judge's decision . . . How much contrition should be expected of a defendant is hard for us to say. This surely is a question better addressed to the discretion of the trial court . . . We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief."

3. Even if any relief should have been granted against the City officials, which is denied, no injunctive relief should have been granted against the City of Jackson and the Municipal Airport Authority.

Both the City of Jackson and the Municipal Airport Authority are public bodies, politic. They are not a person under the Civil Rights Act.

Respondents purport to obtain jurisdiction in the federal court under the Civil Rights Act specifically relying on *28 U.S.C. 1343(3)* and *42 U.S.C. 1983*.

The decision of the Court of Appeals of the Fifth Circuit is in direct conflict with: *Monroe* v. *Pape*, 365 U.S. 167, 5 L.ed.2d 492; *Charlton* v. *Hialeah*, C.A. 5, 188 F.2d 421; *Hewitt* v. *Jacksonville*, C.A. 5, 188 F.2d 423.

Conclusion

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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